

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

MEIJER, INC.

and

Cases 9-CA-40631
9-CA-40778

ROBERT LEE CALDWELL, An Individual

Julius U. Emetu II, Esq., for the General Counsel.
Jeffrey S. Rueble, Esq., of Grand Rapids, Michigan,
for the Respondent.

DECISION

STATEMENT OF THE CASE

MICHAEL A. ROSAS, Administrative Law Judge. This case was tried in Cincinnati, Ohio, on May 24, 2004. The charge in Case 9-CA-40631 was filed October 21, 2003,¹ and the complaint was issued December 30, 2003. The charge in Case 9-CA-40778 was filed January 5, 2004, and a consolidated complaint was issued on February 26, 2004.

The consolidated complaint alleges that the Respondent, Meijer Stores, Inc., violated Section 8(a)(1) of the National Labor Relations Act (Act) by (1) telling an employee on October 17 that he could not distribute union literature at the entry gates to its distribution facility and (2) promulgating and maintaining a rule since October 20 prohibiting employees from soliciting and distributing literature in the parking lots and other exterior nonworking areas of its retail stores. The Respondent filed an answer admitting the jurisdictional aspects of the consolidated complaint and denying that it violated the Act.

At the hearing, the parties were afforded a full opportunity to call and examine witnesses, present oral and written evidence, argue orally on the record and file posthearing briefs. On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Respondent, I make the following

Findings of Fact

I. Jurisdiction

The Respondent, a corporation headquartered in Grand Rapids, Michigan, is a food and general merchandise retailer that operates a distribution center in Tipp City, Ohio, and retail stores in the Dayton, Ohio area. The Respondent derives annual gross revenues in excess of \$500,000 at its Dayton-area stores, and purchases and receives at the distribution center goods valued in excess of \$50,000 directly from points outside the State of Ohio. The Respondent

¹ All dates are 2003 unless otherwise indicated.

admits and I find it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and the Union is a labor organization within the meaning of Section 2(5) of the Act.

5 II. Alleged Unfair Labor Practices

A. The October 17 Incident

For the past 8 years, Robert Caldwell has been employed by the Respondent as a
 10 warehouse clerk at its distribution facility in Tipp City, Ohio. The distribution facility consists of four warehouse buildings—801, 802, 804, and 805. Caldwell is currently assigned to Building 802. As a precondition of employment, he is registered as a member of the United Food and Commercial Workers Local 1099 (Union). However, for some time, Caldwell has not been
 15 pleased with the Union's labor representation. As a result, in September 2003, Caldwell began a campaign to replace the Union with another labor organization. He called his movement the "Real Union" and formed a Real Union website. Since that time, Caldwell has solicited co-workers during his lunch and break periods at the distribution facility, and by distributing flyers to employees in two of Respondent's Dayton-area retail store parking lots. Caldwell's solicitation activities at the distribution facility were consistent with the Respondent's policy of permitting
 20 employees to participate in sports betting pools and charitable fundraising during their break and lunch periods, which constituted nonwork time. However, the Respondent's solicitation policy was superceded partially by its collective-bargaining agreements with five different union locals, which permitted union representatives to solicit, during work time, employee participation in the "Active Ballot Club," a political campaign contribution fund. The only qualification attached
 25 was that such activities not unduly disrupt the Respondent's business.²

After getting off early from the first work shift on the afternoon of October 17, Caldwell drove his pickup truck from the Building 802 parking lot to the parking lot for Buildings 801 and 805. Ed Kennedy, another Building 802 employee, accompanied him. Caldwell parked near the
 30 turnstile-gated entrance to Buildings 801 and 805. Caldwell stood near the entrance, but was not blocking it. When he arrived, employees were still leaving the first shift and others were arriving for the second shift. Caldwell handed out applications for Real Union membership, while Kennedy stayed in the vehicle. He handed out about 100 applications and the distribution was uneventful, until Chris Cullen, a union steward, confronted him. Cullen swore at Caldwell, told
 35 him that employees were already represented by the Union and demanded he leave. Caldwell resisted and continued distributing flyers. Frustrated in his endeavor to stifle Caldwell, Cullen said, "I'll take care of this." As he walked toward the entry gate, Cullen pulled out his cellular telephone. Unbeknownst to Caldwell, Cullen was calling Jack Evans, the Respondent's loss prevention manager at the distribution center. Clearly misstating the situation, Cullen told Evans
 40 there was a disturbance in the 801 parking lot and someone was bothering people there.

When Caldwell finished handing out applications, he got in his truck and started to leave. However, he stopped the vehicle after observing another employee and union shop steward,
 45 Lisa Patton, get out of her car and walk toward the turnstile. Caldwell got out of his vehicle and

² Caldwell and the Matthew Jamrog, the Respondent's manager of collective bargaining and
 50 administration, agreed that the Respondent's solicitation policy, as set forth in the "Team Member Handbook" permitted solicitation in nonwork areas during nonwork time, as well as the exception for the "Active Ballot Club." R. Exh. 2; Tr. 29-30, 124-128.

gave her an application. He did not have any other flyers in his hand.³ At this point, Caldwell's vehicle was 20–30 feet from the entrance.

In the meantime, based on Cullen's representations, Evans went to the parking lot to investigate. When Evans got there, he saw about 12 to 14 employees lined up at the entrance. Evans did not see a disturbance, but noticed a white pickup truck parked in the travel portion of the parking lot.⁴ He saw Caldwell standing next to the open driver's side door of the truck and another person sitting in the truck. Evans, knowing that Caldwell worked in Building 802 on the other side of the complex, assumed he was the subject of Cullen's complaint. Caldwell was also concerned that Evans' truck was parked in the travel portion of the parking lot. As a result, Evans walked over to him and asked if he was "off the clock." Caldwell informed Evans he was off duty. Evans responded that Caldwell had no business being there and asked him to leave. Caldwell responded that he had a right to be there. When Evans repeated his directive, Caldwell said, "we'll see about that," got in his truck and left. Caldwell never said anything about passing out union flyers. After Caldwell left, Evans saw Patton standing nearby with a piece of paper in her hand. Evans approached Patton and asked what Caldwell gave her. She told Evans that it was an application for membership in Real Union. At Evans request, Patton gave him the flyer. Evans took the form back to his office and reported the incident to Rick Hershberger, director of the distribution facility. Hershberger told Evans to submit a report to Matthew Jamrog, the Respondent's manager of collective bargaining and contract administration.⁵

B. The October 20 Letter

On October 20, the next workday, Evans met and discussed the October 17 incident with Jamrog. Later that day, Evans distributed a memorandum to security staff explaining that employees were permitted to pass out union literature in the distribution facility parking lot during nonwork time. In addition, Jamrog sent a letter to Caldwell by certified mail outlining the Respondent's solicitation policy.⁶ The letter, which was received by Caldwell on or shortly after that date, and stated in pertinent part:

³ I credit the testimony of Patton that Caldwell did not have any other flyers in his hand. Tr. 96. Caldwell's testimony—that he had driven about 20 feet when he saw Patton, stopped his vehicle, got out to hand her a flyer—supports a strong inference that he did not have any other flyers in his hand when approached by Evans. Tr. 60.

⁴ Caldwell conceded on cross-examination that he was not parked in a parking space. Tr. 36–37.

⁵ Due to the significant inconsistencies in Caldwell's testimony on this issue, I did not credit his assertion that he handed one of the flyers to Evans prior to being told by the latter that he had to leave. Caldwell testified at trial that, when Evans approached him in the parking lot, Evans touched his shoulder and asked, "what have you got there, what are you doing." Caldwell allegedly responded by handing Evans a flyer and telling him that he was passing out applications for the Real Union. Tr. 21. However, Caldwell contradicted this testimony in an affidavit sworn to on December 19, 2003. In that affidavit, Caldwell failed to mention that he handed Evans a copy of the flyer, that Evans touched his shoulder or asked him what he was passing out. Tr. 39–40. On the other hand, I found Evans and Patton to be credible witnesses. As such, I credit the consistent testimony of both that, as Evans approached Caldwell, the latter had nothing else in his hands. Evan and Patton each testified that it was she who gave Evans a copy of the flyer after Caldwell drove away.

⁶ R. Exh. 1.

Based on your recent distribution of materials on Meijer property we have been receiving questions regarding our "Solicitation Policy." I would like to re-affirm our policy regarding this matter.

Simply stated, our Solicitation Policy prohibits solicitations and/or distributions of any materials on company property (including sidewalks and parking lots) by non-team members for any purpose. Team members shall not engage in solicitation for any purpose during the work time of the person being solicited or the person doing the solicitation.

In addition, distribution of literature or any other material of any kind is not allowed during actual working time or in any work area of any Meijer facility at any time. Materials will not be allowed to be posted or left laying around anywhere in our facilities.

This rule does not apply to break periods, meal periods or any other specified period during the work day when both the soliciting and solicited Meijer team member are on non-working time and in non-public, non-working areas. This means that both the solicitor and the team member must not be on the clock and must be in a non-work area, i.e., breakrooms. The company considers our store parking lots to be a "work area" since we have team members that work in this outside area of the store.

At no time will we allow a non-team member or team members from other units/stores to be in the backrooms or breakrooms of other units/stores to solicit team members. They must stay only in areas where the general public is allowed, and cannot solicit team members that are in work areas or on the clock.

Finally, our telephone, telephone lines, fax machines, copy machines and all business equipment are for business use only and are not to be used for any non-business reasons.

These and other policies are set forth in the Team Member Handbook. I have enclosed a copy the handbook for your reference. Hopefully, the handbook and this letter will clarify any questions you may have regarding our Solicitation Policy. If you have any other questions in the future, please do not hesitate to contact me at (616) 791-5450.

In fact, the October 20 letter did not reaffirm the Respondent's solicitation policy. The letter specifically stated that solicitation and distribution were not permitted in the retail store parking lots and implied that such activity was permitted in the distribution facility parking lot. However, the actual policy, which was contained in the Team Member Handbook, prohibited such activity in *all* of the Respondent's parking lots and sidewalks:

Non-Solicitation/Non-Distribution and Non-Trespass Policy

Policy No: 079 Revision: 1 Effective: 06/08/94

The Company prohibits solicitation and/or distribution of any materials on Company property (including sidewalks and parking lots) by non-associate/team members for commercial, charitable or any other purpose. Associates/team members shall not engage in commercial, charitable or any other solicitations in non-sales working areas during their working time or the working time of the associate/team member being solicited. For purposes of the foregoing, "working time" does not include authorized break or meal periods or any other specified periods during the work day when the

associate/team member properly is not engaged in performing work tasks. Associates/team members shall not at any time engage in distribution of any materials of any sort in any work areas.

5 To further explain to the general public our general policy, we post the following notice:

NOTICE TO THE PUBLIC

10 Solicitation or distribution of literature or other matter and trespass by members of the public and/or non-Meijer employees is prohibited on this property.

15 Within 2 weeks after the October 20 letter was issued, Caldwell ran into Evans and asked for clarification of the letter. Evans referred Caldwell to Mike Sullivan, the Building 802 supervisor. Caldwell complied and spoke with Sullivan. Specifically, Caldwell wanted to know whether the letter authorized solicitation in the distribution facility parking lots. Sullivan said he would consult with Jamrog and get back to him. Within a day, Sullivan informed Caldwell he could distribute literature in the distribution facility parking lots, with certain restrictions: the distribution had to be during nonwork time; flyers could not be placed on windshields; and neither harassment nor littering would be permitted.⁷ Nevertheless, after the October 17 incident, Caldwell stopped distributing literature in the distribution facility parking lots. Caldwell's inaction was attributable to a change in his work schedule, which made it made difficult to catch other employees during shift changes, and "a lack of positive response" from employees. It was not attributable to the October 20 letter.⁸

25 *C. The Retail Store Parking Lot*

The October 20 letter and Sullivan's subsequent statement to Caldwell informing him that he could solicit co-employees in the distribution facility parking lots reaffirmed the Respondent's prohibition against solicitation and distribution in the Respondent's store parking lots.⁹ Respondent's rationale for its no-solicitation policy in store parking lots, as stated in the Team Member Handbook, is that those areas constitute work areas. In determining whether its store parking lots constitute work areas, a review of the activities at one of the Respondent's typical Dayton-area stores is appropriate.

35 A typical store operated by the Respondent in the Dayton area is Store 102 in Kettering.¹⁰ Store 102 is open 24 hours a day, 7 days a week. The store occupies a 4.5-acre

40 ⁷ The exact date of Caldwell's request for clarification of the October 20 letter was unknown. Caldwell estimated that it occurred "roughly two weeks" later, while Sullivan testified that Caldwell approached him later that week or the following week. The exact timing of their conversation is inconsequential. Tr. 25-26, 106-107.

45 ⁸ At the hearing, Caldwell claimed that the October 20 letter deterred him from further distribution of union literature. Tr. 51. However, he conceded in his December 19 affidavit that he stopped distributing literature due to a change in his schedule to a 6-day workweek, which made it difficult to "catch other employees as they begin and end their shifts." Tr. 56-57.

⁹ As previously discussed, the letter and Sullivan's statement assured Caldwell of his Section 7 right to distribute and solicit in the distribution facility parking lot. However the no-solicitation policy contained in Respondent's employee handbook, which remained in effect, continued to prohibit such activity in *all* of Respondent's facilities.

50 ¹⁰ Ken Barclay, an employee of nearly 21 years, has been the director of six Meijer stores over the past 10 years. He testified that the Kettering store was similar in size and layout to the

Continued

portion of the 46-acre property. The store's parking lot extends over 10–15 acres and has approximately 1000 parking spaces. The remainder of the property consists of wooded areas, grass, and retention ponds.¹¹

5 The type of work performed in the Store 102 parking lot consists of periodic work activity and sporadic work activity. Periodic work activities are performed by utility clerks and security guards. Security guards periodically patrol the parking lot, while utility clerks push and collect shopping carts. Each store utilizes approximately 50 to 80 utility clerks. Each utility clerk collects approximately 86 shopping carts per hour, helps customers load purchases into vehicles about 10 30 times per workday, and collects trash. In addition, employees from the Respondent's gas station on the outer edge of the property carry cash or materials through the parking lot to or from the store. Sporadic activities are performed by utility clerks and contractors. Utility clerks occasionally trim bushes and trees, and shovel snow in limited areas—along the front of the store, in front of fire exits and handicapped parking spaces. They wear safety reflective vests to 15 make them visible to moving vehicles. Contractors are employed to mow grass, paint stripes, and clean, sweep, or plow snow in the parking lot.

20 Portions of the parking lot and areas immediately outside the store are also used sporadically for displaying, selling and storing products, and promotional activities.¹² Seasonal products, such as lawnmowers, gas grills, swing sets, and pools, are displayed between the two entrances in front of the stores. Store clerks occasionally operate periodic garden and sidewalk sales. In addition, companies such as NASCAR, United Way, and Coca Cola are permitted to hold promotional events in the parking lot.

25 On an average day, Store 102's parking lot experiences significant customer and employee activity. Store 102 has approximately 7000 daily transactions; on Saturdays, it averages 9000–9500 transactions. During holiday seasons, the store has in excess of 10,000 daily transactions. The number of store transactions generally reflects the number of customer vehicles utilizing the parking lots. However, while cold statistics are informative, the most 30 meaningful evidence of a day in the life of the Store 102 parking lot can be gleaned from security videotape generated by the Respondent in the regular course of business.

35 Videotape of Store 102's parking lots during the period of 4:24 p.m. to 7 p.m. on May 15, 2004, depicts typical customer and employee activity on a Saturday afternoon.¹³ The videotape, which runs at double the speed of real time, shows footage from three video cameras positioned on the store's roof. The cameras continuously rotate in providing varying views of the main parking area in front of the store and the garden center parking lot adjacent to the right side of the store.¹⁴ The camera on the left side of the store is marked "west." The camera on the right side of the building is marked "east," while the camera in between them is marked "center."

40 other four Dayton-area stores located at Harshman Road and in Springboro Pike, Englewood, Beaver Creek, and Troy.

¹¹ R. Exh. 3.

45 ¹² Jamrog could not say the frequency that Respondent has such vendor events or sidewalk sales in the parking lot.

50 ¹³ The videotape was received in evidence with the understanding that the parties would subsequently determine what portion of the tape to submit into the record. In a letter, dated June 2, 2004, the parties reported their agreement that the portion of the tape between 1624 hours (4:24 p.m.) and 1900 hours (7 p.m.) be received in evidence. The letter has been received in evidence as Jt. Exh. 2.

¹⁴ None of the videotapes cover the loading docks on the left side of the store.

During the videotaped period, the parking lot was approximately half full. All three cameras revealed a significant amount of empty parking spaces in the outer portions of the parking lot. The west camera showed vast open areas on the left side of the main parking area. The east camera showed vast open areas on the right side of the main parking area and the garden center parking area. The cameras also showed a constant, but slight, flow of pedestrian and vehicular traffic throughout the main parking lot. Utility workers can be seen pushing shopping carts on four occasions.¹⁵

Store 102 has approximately 425 employees, 90–95 percent of whom are covered by the Respondent's collective-bargaining agreement with the Union. However, one seeking to solicit employees in the parking lot during nonwork time would not be able to distinguish every employee from a customer for several reasons. First, store employees park throughout the parking lot. The Respondent urges employees to park in the outer portions of the parking lot, but they generally ignore that request. Second, employees start or leave work at various times, do not have set shifts and enter and leave each store through the same entrances and exits used by customers. Lastly, while some employees arrive to or leave work wearing the Respondent's mandatory clothing,¹⁶ others change into or out of their work clothes in the store locker room.

III. Discussion

A. The October 17 Incident

The General Counsel asserts that the Respondent violated Section 8(a)(1) by prohibiting Caldwell from distributing literature and soliciting union membership in the distribution facility parking lot on October 17. The Respondent does not dispute that Caldwell engaged in concerted, protected activity by distributing union flyers in the distribution parking lot on October 17. However, it does contend that Evans, the security manager who directed Caldwell to leave the parking lot that day, was unaware Caldwell had been engaging in union activity. Furthermore, assuming, *arguendo*, that Evans knew about Caldwell's union activity, the Respondent took prompt and effective action to repudiate any unlawful conduct.

Section 7 of the Act provides, in pertinent part, that "[e]mployees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities." An employer who interferes with, restrains, or coerces employees in the exercise of such rights violates Section 8(a)(1). The test does not turn on the employer's motive or whether the coercion succeeded or failed, but rather, whether the employer engaged in conduct, which it may be reasonably said, tends to interfere with the free exercise of employee rights under the Act. *Gissel Packing Co.*, 395 U.S. 575 (1969); *Almet, Inc.*, 305 NLRB 626 (1991); *American Freightways Co.*, 124 NLRB 146, 147 (1959).

The evidence established that Evans was not aware of Caldwell's union activities when he told him to leave the distribution facility parking lot on October 17. Evans testified credibly that he approached Caldwell after receiving a telephone call from Cullen complaining that an unnamed person was bothering people in the parking lot. Evans conceded he did not see a

¹⁵ Barclay opined that the activity shown on the videotape is "an average of the day," while the period of 5:30 to 6:30 p.m. is the busiest time of the day. Tr. 181–184; R. Exh. 4.

¹⁶ Store employees are required to wear name badges on company-issued red or teal colored polo shirts and black or khaki colored pants.

disturbance, but approached Caldwell because he saw him standing next to his truck, which was parked in a strange spot in the travel portion of the parking lot; Patton was standing nearby. Evans also knew Caldwell worked on the other side of the distribution facility and asked if he was "on the clock." After Caldwell informed him that he was on nonwork time, Evans told him to leave. Caldwell responded that "we'll see about that" and drove away. It was after Caldwell left that Evans asked Patton what she had in her hand. Patton showed Evans the flyer and agreed to let him have it. Evans then submitted the flyer to management for advice as to how his staff should handle solicitation in the future. Evans' version of the events was corroborated by Patton, whom I also found credible.

Caldwell, on the other hand, was not credible in his rendition of the facts surrounding the incident of October 17. As previously explained, that portion of Caldwell's trial testimony was fraught with inconsistencies. In his sworn affidavit to the General Counsel on December 19, Caldwell omitted any reference to the following events as alleged at trial: that Evans approached him in the parking lot, placed an arm on his shoulder and asked what he had in his hand; and that Caldwell then handed Evans a flyer and told him he was passing out applications for Real Union. Accordingly, the General Counsel failed to meet his burden of proving that Evans knew Caldwell was engaged in concerted protected activity when he asked him to leave the parking lot on October 17.

Assuming, *arguendo*, that the General Counsel had demonstrated knowledge on the part of Evans at that time, the October 20 letter repudiated his illegal conduct. The letter was sent to Caldwell by Jamrog the next business day and assured Caldwell that, in the future, he would be permitted to distribute literature in the distribution facility parking lot. Accordingly, the October 20 letter was timely and cured any violation of Section 8(a)(1) with respect to the October 17 incident. *Passavant Memorial Area Hospital*, 237 NLRB 138, 139 (1978); *Atlantic Forest Product, Inc.*, 282 NLRB 855, 872 (1977).

B. The Respondent's Distribution and Solicitation Policy

The General Counsel also asserts that the Respondent violated Section 8(a)(1) by promulgating and maintaining a rule prohibiting employees from distributing any literature in the parking lots and other exterior nonwork areas of its retail stores. The Respondent contends that it may legally maintain such a policy because its store parking lots constitute work areas "where therefore, solicitation and distribution could create traffic and safety hazards and embroil customers in union organizational activity."¹⁷

The Section 7 right of employees to engage in union solicitation at their place of business is limited only by an employer's legitimate interest of maintaining production and workplace discipline. *United Services Auto Association*, 340 NLRB No. 90, slip op. at 3 (2003); *Daylin Inc.*, 198 NLRB 281 (1972). Accordingly, the Board has long presumed lawful rules restricting union solicitation or distribution when employees are expected to be working. *Star-Brite Industries, Inc.*, 127 NLRB 1008, 1010 (1960). Employers may also ban solicitation and distribution in the working areas of their facilities in order to prevent hazards to production. *Stoddard-Quirk Mfg.*, 138 NLRB 615, 619 (1962). However, an employer violates Section 8(a)(1) if it fails to enforce a no-solicitation rule against similar activities, while simultaneously enforcing the rule against union solicitation or distribution. *St. Vincent's Hospital*, 265 NLRB 38, 40 (1982).

¹⁷ R. Br. at 21.

On the other hand, a prohibition on communication among employees cannot be so broad that it prohibits communication during paid nonwork periods such as breaks and lunch breaks or during unpaid work periods, such as before and after work, if the employees are lawfully on the employer's premises. Such broad prohibitions are presumptively invalid. *Laidlaw Transit, Inc.*, 315 NLRB 79, 82 (1994); *St. John's Hospital*, 222 NLRB 1150 (1976). Similarly, absent adequate business justification, it is a violation of 8(a)(1) for an employer to promulgate, maintain, or enforce a rule prohibiting off-duty employees from soliciting or distributing literature in the employer's parking lots and other outside nonwork areas. *St. Luke's Hospital*, 300 NLRB 836, 837 (1990), *Orange Memorial Hospital*, 285 NLRB 1099 (1987); *Tri-County Medical Center*, 222 NLRB 1089 (1976). Such Section 7 organizational rights also attach to off-duty employees, like Caldwell, seeking such access at facilities other than those where they work. *Hillhaven Highland House*, 336 NLRB 646, 648 (2001).

Nevertheless, the Respondent maintains that its parking lot and the exterior areas around its stores are working areas. In order to constitute a work area, an area must be integral, not merely incidental, to the employer's main function. *Santa Fe Hotel and Casino*, 331 NLRB 723, 730 (2000) (security, maintenance, and gardening at entrances outside hotel-casino incidental to main functions of lodging and gambling); *United States Steel Corp.*, 223 NLRB 1246, 1248 (1976) (work tasks such as "cleaning up, maintenance or other incidental work, are performed at some time in almost every area of every company."); *National Steel Corporation*, 173 NLRB 401, 403 (1968), *enfd.* 415 F.2d 1231 (6th Cir. 1969) (existence of security guards did not convert parking lot, streets, passageways, and sidewalks into working areas).

The primary purpose of the Respondent's retail store parking lots is to provide customer and employee parking. They are also places where employees perform a variety of periodic or sporadic work activities. Utility clerks periodically retrieve shopping carts and, as necessary, assist customers load purchases. Sporadically, the Respondent's employees display merchandise or conduct sidewalk sales and other promotional events. Unlike the stores, there are no employees permanently stationed in the parking lots, there are no cash registers and no constant customer-employee interaction. There are also occasions when other companies are permitted to hold promotional events, like NASCAR racing, United Way fundraisers, and Coca Cola-sponsored children's activities. However, these functions are merely incidental to the Respondent's primary function—the business of selling merchandise inside its stores. Indeed, the Respondent treats its parking lots as an incidental function by permitting its employees to flout the directive to park on the outer portions, thereby preventing customers from parking closer to the store.

As depicted in videotape of Store 102's parking lot, there is a continuous, albeit dispersed, flow of pedestrian and vehicular activity throughout the parking lot on a typical day. However, the activity shown failed to reveal the performance of a significant amount of work in the parking lot, which was half-full. Utility clerks collected and pushed shopping carts on several occasions, but none are seen assisting customers. There was no evidence of a sidewalk sale or any type of promotion. There was also no indication of how union solicitation or literature distribution to off-duty employees would create a littering hazard and safety risks for utility workers and customers.

Under the circumstances, the Respondent failed to demonstrate a business justification for its broad prohibition against the solicitation and distribution in the Respondent's store parking lots and exterior nonworking areas. *Ohio Masonic Home*, 290 NLRB 1011 (1988). Furthermore, the policy, as set forth in the Respondent's employee handbook, remains in effect as to *all* of the Respondent's facilities, including the distribution center. The October 20 letter to Caldwell did nothing to modify that policy, which continues to apply to all employees. Accordingly, the

Respondent's no-solicitation policy is overly broad as it applies to union solicitation and distribution, during employees' nonwork time, in the distribution facility parking lot and its retail stores.¹⁸ On this basis, the Respondent's policy constitutes an unfair labor practice in violation of Section 8(a)(1). However, the legal consequences flowing from Respondent's illegal no-solicitation/distribution rule do not end there.

The employee handbook rule prohibiting solicitation or distribution during the working time is presumptively valid on its face. Nevertheless, Respondent disparately enforced the rule by agreeing to a collective-bargaining provision permitting employees, while working, to engage in campaign activity on behalf of the Union—the Active Ballot Club—but then refusing to permit employees in other types of union solicitation. Other solicitation would include Caldwell's criticism of the Union and advocacy for a new union. The record is devoid of any evidence tending to show that such a ban on Section 7 rights—in contrast to specific advocacy for the Active Ballot Club—is necessary for the operation of its stores or for the maintenance of discipline or security in its parking lots. Accordingly, the presumption of validity attaching to Respondent's no-solicitation rule as it related to working time activity was invalidated by its unfair and disparate application. *Capitol Records, Inc.*, 233 1041, 1045–1046 (1977), citing *Star-Brite Industries, Inc.*, 127 NLRB at 1010 (“presumptions [of validity attaching to a rule prohibiting solicitation] may be overcome . . . by evidence establishing an unfair application of the rule”). Accordingly, I conclude that by disparately enforcing the handbook rule to preclude solicitation and distribution not otherwise related to the Active Ballot Club, the Respondent violated Section 8(a)(1).¹⁹

Conclusions of Law

1. Meijer, Inc. is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. By promulgating and maintaining a policy prohibiting employees from engaging, during nonworking time, in solicitation and the distribution of literature in the parking lots and other exterior areas of its retail stores and distribution facilities, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) of the Act.

3. By promulgating, maintaining and enforcing a policy prohibiting employees from soliciting during working time, while simultaneously permitting employees to engage in a specific type of solicitation on behalf of the Union during working time, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) of the Act.

4. By engaging in the conduct described above, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

¹⁸ The consolidated complaint only alleged a violation as to the applicability of Respondent's policy to the parking lots and other exterior areas of its stores. However, the issue was fully litigated and evidence received of the employee handbook rule regarding solicitation and distribution at all of Respondent's facilities. See *Facet Enterprises v. NLRB*, 907 F.2d 963, 969–975 (10th Cir. 1990).

¹⁹ The theory of disparate enforcement of Respondent's no-solicitation rule to working and nonworking time activities was neither pled nor argued by the General Counsel. However, this issue was also fully litigated with the testimony from both sides regarding the Active Ballot Club.

5. The Respondent did not further violate the Act as alleged at paragraph 4(a) of the consolidated complaint.

Remedy

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Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

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On these findings of fact and conclusions of law and on the entire record, I issue the following recommended²⁰

ORDER

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The Respondent, Meijer, Inc., Grand Rapids, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

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(a) Promulgating, maintaining or enforcing a rule or policy that prohibits its off-duty employees from engaging in union solicitation and distribution in the parking lots and other exterior areas of its Tipp City, Ohio distribution facility and Dayton, Ohio-area retail stores located at Harshman Road and in Kettering, Springboro Pike, Englewood, Beaver Creek, and Troy.

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(b) Promulgating, maintaining or enforcing a rule prohibiting its employees from engaging in union solicitation during working time, unless such activities would unduly disrupt the Respondent's business.

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(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

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(a) Rescind Policy No. 079 in the Team Member Handbook and the letter of October 20, 2003. Furthermore, the Respondent shall notify its employees, in writing, that it has done so.

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(b) Within 14 days after service by the Region, post at its Tipp City distribution facility and Harshman Road, Springboro Pike, Englewood, Beaver Creek, and Troy, Ohio retail stores copies of the attached copies of the attached notice marked "Appendix."²¹ Copies of the notice, on forms provided by the Regional Director for Region 9, after being signed by Respondent's authorized representative, shall be posted by Respondent and maintained for 60 consecutive

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²⁰ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

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²¹ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

5 days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, Respondent has gone out of business or closed the facility involved in these proceedings, Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by Respondent at any time since October 20, 2003.

10 (c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

15 IT IS FURTHER ORDERED that the consolidated complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. August 31, 2004

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Michael A. Rosas
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this Notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT do anything that interferes with, restrains, or coerce you with respect to these rights.

WE WILL NOT promulgate, maintain or enforce any rule which prohibits our off-duty employees from engaging in union solicitation or the distribution of literature at any of the parking lots or other exterior areas of our Tipp City, Ohio distribution facility and Dayton, Ohio-area retail stores located at Harshman Road and in Kettering, Springboro Pike, Englewood, Beaver Creek, and Troy.

WE WILL NOT promulgate, maintain or enforce any rule prohibiting union solicitation by employees during working time, while simultaneously permitting certain types of union solicitation, for example, discussion relating to the Active Ballot Club campaign of the United Food and Commercial Workers Local 1099.

WE WILL rescind Policy No. 079 in the Team Member Handbook and a certain letter, dated October 20, 2003, from Matthew Jamrog to Robert Caldwell reaffirming that policy.

MEIJER, INC.

(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlr.gov.

550 Main Street, Federal Office Building, Room 3003, Cincinnati, OH 45202-3271
(513) 684-3686, Hours: 8:30 a.m. to 5 p.m.

JD-84-04
Cincinnati, OH

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (513) 684-3750.